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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA,

*Petitioner,*

*vs.*

STATE OF CALIFORNIA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ASIAN PACIFIC AMERICAN LEGAL CENTER, JOHN C. LANGSTON BAR ASSOCIATION, KOREAN AMERICAN BAR ASSOCIATION, LAWYERS FOR HUMAN RIGHTS, MEXICAN AMERICAN BAR ASSOCIATION, PHILIPPINE-AMERICAN BAR ASSOCIATION OF LOS ANGELES, AND SOUTHERN CALIFORNIA CHINESE LAWYERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a national, nonpartisan organization with almost 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The national

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

ACLU and its three California affiliates (ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego) are acutely concerned with the manner in which capital punishment is imposed in the United States and the effect that racial discrimination has on the administration of the criminal justice system. These and other concerns surrounding capital punishment prompted the creation of the ACLU Capital Punishment Project, which is dedicated to eradicating constitutional violations in capital cases and to educating the public about the serious moral and legal questions that the death penalty raises.

This case presents an issue of substantial concern to the ACLU: Whether California's death sentencing procedures adequately channel and guide juries' discretion to impose the ultimate punishment so as to minimize the influences of racial prejudice and other biases. The ACLU files this brief because without adequate guidance, juries in California may, and do, impose death sentences based on race and other constitutionally impermissible factors.

Asian Pacific American Legal Center

The Asian Pacific American Legal Center is a group of lawyers and non-lawyers who volunteer to serve the Asian Pacific American community in Southern California in a number of capacities, including *pro bono* work by attorneys which involves direct representation, consultation, and *amicus* participation. One community served by the Legal Center is the Samoan community.

Although the Legal Center's main focus is the interest of the Asian Pacific American community, the goals of the organization include a commitment to civil rights and due process of law for all people. After due reflection on the issue of vagueness of the California death penalty statute and the risk that capital sentences may be influenced by racial considerations, the Legal Center submits as *amicus curiae* the



argument set out herein. The Legal Center notes that, as far as anyone at the Center associated with this brief is aware, the Center has neither dealt with nor is acquainted with the petitioner or his family.

The John C. Langston Bar Association

The John C. Langston Bar Association, based in Los Angeles, California, is an association of approximately nine hundred members who practice in all areas of the law in state and federal courts. Two of the Association's primary purposes are to defend and protect the interests of the African-American community and to promote the diligent application of legal skills in furtherance of civil rights and due process of law.

The John C. Langston Bar Association joins as *amicus curiae* because of the deep concern that racism in the judicial system be minimized. As a group, the John C. Langston Bar Association takes no position on the death penalty. However, under California Penal Code section 190.3, racism could well play an invisible, but significant, role in a jury's decision to sentence a defendant to death. Since racism in the sentencing process is intolerable, the John C. Langston Bar Association joins in support of petitioner's argument that authorizing a jury to weigh the "circumstances of the crime" as a factor in aggravation leaves a jury with no guidance in its consideration of both proper and improper matters.

The Korean American Bar Association

The Korean American Bar Association has approximately one hundred members in the greater Los Angeles, California area. The Korean American Bar Association's lawyers practice in all areas of the law. One purpose of the Association is the encouragement of anti-racist attitudes in the community-at-large, as well as in the civil and criminal justice system. While the Association takes no organized position on the death penalty, the Association is

concerned anytime there is a risk of racism playing a part in the judicial system, and such a risk exists with the current California death penalty procedures. Therefore, as more fully set out below, the Korean American Bar Association fears that the California death penalty statute, as written and applied, allows for the possibility of racism through the weighing of the "circumstances of the crime" in aggravation.

Lawyers for Human Rights

Lawyers for Human Rights (LHR), the lesbian and gay bar association of Los Angeles, has approximately three hundred members. LHR is very concerned with human rights in general and civil rights specifically, both for the lesbian and gay community and for the rest of the minority community. Having considered California Penal Code section 190.3 and the instructions given to capital juries, LHR has concluded that these instructions create an unacceptable danger that many forms of discrimination, including racial discrimination, may influence sentencing decisions and therefore submits this brief on behalf of petitioner.

Mexican American Bar Association of
Los Angeles County

The 1500-member Mexican American Bar Association of Los Angeles County (MABA) is the largest local minority bar association in the United States. Among MABA's organizational goals is the advocacy of, and commitment to, human and civil rights and the improvement of the community for Latinos and persons of all races. Having in mind those goals, MABA is concerned with the possibility of racial stereotypes and discrimination influencing a jury's decision to impose a capital sentence. As described below, MABA is particularly alarmed at the provision in the statute which places no limitation on the jury's weighing of the "circumstances of the crime" as a factor in aggravation of sentence. Without such limitations, the California death



sentencing procedures have the great potential to work to the detriment of any minority defendant.

Philippine-American Bar Association of Los Angeles

The Philippine-American Bar Association of Los Angeles encourages the study of law, the exchange of ideas, and awareness of the Philippine position in the community. The Association's legal activities focus on the rule of law and concepts of fairness. A review of California Penal Code section 190.3(a), and reflection upon the part it may play in the death-penalty sentencing process, causes the Association to join with other *amici* in supporting the position that this law has a strong potential for the introduction of racist attitudes in the imposition of the death penalty.

The Southern California Chinese Lawyers' Association

Organized in 1975, the Southern California Chinese Lawyers' Association (SCCLA) is a mutual support network for Chinese American lawyers, jurists, and law students in the Los Angeles area consisting of over four hundred members. SCCLA is deeply concerned about the circumstances which allow racism to enter into the judicial process. As a minority bar association, SCCLA is committed to the advancement of civil rights for all people.

As a result of that commitment, SCCLA has concluded that the "circumstances of the crime" aggravating factor in the jury instructions in this case is unconstitutionally vague and without limits. SCCLA believes that there is a great and real danger that racism could creep, if not march, into jury penalty deliberations. Therefore, SCCLA supports the argument that subsection (a) of California Penal Code section 190.3 is an unconstitutionally vague aggravating factor.

## STATEMENT OF THE CASE

A California jury convicted Petitioner Paul Palalaua Tuilaepa of first degree murder, found true the special circumstance that the murder occurred during the commission of a robbery, and sentenced him to death. *People v. Tuilaepa*, 4 Cal.4th 569, 576-77, 15 Cal. Rptr. 2d 382, 385, 842 P.2d 1142, 1145 (1992).

On appeal, Mr. Tuilaepa challenged the constitutionality of California's capital sentencing scheme. California employs a two-step process in determining whether a capital defendant is "death-eligible." The first step entails deciding whether the defendant is guilty of first degree murder and whether at least one "special circumstance" is present. Cal. Penal Code § 190.2(a) (1994).[2]

The second step requires the sentencer to weigh the various factors enumerated in California Penal Code section 190.3. The sentencer is to "consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section" and determine whether one set of circumstances "outweighs" the other in deciding the appropriate sentence.[3] Cal. Penal Code § 190.3 (1994); *see also* Former Cal. Penal Code § 190.3 (1987) (statute in effect at time of murder contained same provisions).[4]

---

[2] The statutory special circumstance provisions in effect at the time of the crime and Mr. Tuilaepa's trial provided that death was a possible punishment if (1) the murder was for financial gain; (2) defendant was previously convicted of murder; (3) multiple murders were involved in the present proceeding; (4) the murder was by means of a hidden destructive device; (5) the murder was committed to avoid arrest or to escape from custody; (6) the murder was by means of a destructive device mailed or delivered; (7) the victim was a peace officer; (8) the victim was a federal law enforcement officer; (9) the victim was a fire fighter; (10) the victim was killed to prevent him or her from testifying; (11) the victim was a prosecutor or former prosecutor; (12) the victim was a judge or former judge; (13) the victim was an elected public official; (14) the murder was especially heinous, atrocious and cruel; (15) the defendant killed while lying in wait; (16) the victim was killed because of his or her race, color, religion, nationality or country of origin; (17) the murder was committed during the course of one of nine enumerated felonies; (18) the murder involved torture; (19) the murder was committed by poison. Former Cal. Penal Code § 190.2. Since Mr. Tuilaepa's trial, California Penal Code section 190.2 has been amended to expand the scope of the special circumstances. Cal. Penal Code § 190.2 (1994).



[3] Following the grant of certiorari in this case, the California Supreme Court issued its opinion in *People v. Bacigalupo*, 6 Cal.4th 457, 24 Cal. Rptr. 2d 808, 862 P.2d 808 (1993), on remand from *Bacigalupo v. California*, 506 U.S. ___, 113 S. Ct. 32 (1992), in which the Court reformulated the role of the factors contained in Penal Code section 190.3. Petitioner's Brief and Brief *Amicus Curiae* of the California Appellate Project address the effect of the California Supreme Court's decision on the issues raised in this case. Rather than repeat the discussion in those briefs, *Amici* joins the argument by Petitioner and the California Appellate Project that *People v. Bacigalupo* does not alter the constitutional analysis or infirmity of Penal Code section 190.3.

[4] California Penal Code section 190.3 provides that the following enumerated factors are to be considered by the jury:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true;
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
>
> (c) The presence or absence of any prior felony conviction;
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the

(continued...)

Mr. Tuilaepa's constitutional challenge included the argument that the California sentencing scheme fails to guide adequately the jury's discretion because Penal Code section 190.3(a), the "circumstances of the crime" aggravating factor, is impermissibly vague under this Court's decision in *Stringer v. Black*, 503 U.S. ___, 112 S. Ct. 1130 (1992). *People v. Tuilaepa*, 4 Cal.4th at 594, 15 Cal. Rptr. 2d at 397, 842 P.2d at 1157.

The California Supreme Court rejected this claim. *Id.* The state court concluded that the "circumstances of the crime" aggravating factor "embodies a consideration the United States Supreme Court has itself identified as 'one of the criteria upon which the jury *should* base its penalty determination.'" *Id.* (quoting *People v. Proctor*, 4 Cal.4th 499, 551, 15 Cal. Rptr. 2d 340, 370, 842 P.2d 1100, 1130 (1992) (emphasis in original)). The court further explained that this sentencing factor was not unconstitutionally vague or "illusory" "simply because [it leaves] the sentencer free to evaluate the evidence in accordance with his or her own subjective values." *People v. Tuilaepa*, 4 Cal.4th at 595, 15 Cal. Rptr. 2d at 397, 842 P.2d at 1158.

[4](...continued)
homicidal act;

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

(i) The age of the defendant at the time of the crime;

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

(k) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

Although section 190.3 does not designate which of the enumerated factors is aggravating and which is mitigating, the California Supreme Court has "noted that certain of the factors can only be mitigating (e.g., factors (d), (e), (f), (g), (h), and (k))" and "[t]he aggravating nature of certain other factors." *People v. Montiel*, 5 Cal.4th 877, 944, 21 Cal. Rptr. 2d 705, 744, 855 P.2d 1277, 1316 (1993). One of the statutory aggravating factors is section 190.3(a), the "circumstances of the crime." *People v. Edwards*, 54 Cal.3d 787, 833, 1 Cal. Rptr. 2d 696, 725, 819 P.2d 436, 465 (1991).



## SUMMARY OF ARGUMENT

In *Furman v. Georgia*, 408 U.S. 238 (1972), a majority of this Court recognized that capital punishment schemes that permit juries to impose death sentences based on their own prejudices and biases invariably produce constitutionally defective sentences. To minimize the risk that racial and other constitutionally impermissible considerations will infect the capital sentencing process, this Court has required that sentencing procedures guide juries in exercising their discretion to impose death. Without such guidance, capital sentencing juries are left "with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

When a state elects to guide the jury's discretion by identifying aggravating factors to be weighed in the sentencing decision, those factors must be "'clear and objective,'" *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)), and "defined with some

degree of precision," *Stringer v. Black*, 112 S. Ct. at 1133. When state procedures permit a jury to find and weigh a vague aggravating factor, there is an unacceptable danger that the resulting death sentence may be based on "an illusory circumstance." *Stringer*, 112 S. Ct. at 1139. Moreover, where the trial involves cross-racial violence or a minority defendant, there is a real and unacceptable risk that the illusory circumstance will be not only illusory but also illicit. In such a case, the attempted "guidance," rather than checking the influence of racism, will serve only to magnify its effects by adding the stamp of instructional authority.

The California death sentencing scheme introduces into the weighing process an aggravating factor so vague that, because of its breadth, it is particularly likely to produce death sentences predicated on illicit factors. California Penal Code section 190.3(a) -- as written and as interpreted by the California Supreme Court -- authorizes juries to find and weigh the "circumstances of the crime" as a factor in aggravation, but provides no guidance as to the scope of that factor or as to what facts might make it aggravating.

Because the California procedures do not "'focus [jurors' consideration] on the *particularized* circumstances of the crime'" that constitute constitutionally permissible aggravating factors, jurors in California are permitted to draw their own inferences. *McCleskey v. Kemp*, 481 U.S. 279, 307 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)) (emphasis added). When jurors are invested with such unlimited discretion to find the existence of a factor that is weighed on death's side of the scale, there is an unacceptable risk that considerations of race and other constitutionally impermissible factors infect capital sentencing decisions. *See Turner v. Murray*, 476 U.S. 28, 35 (1986).



## ARGUMENT

## THE CALIFORNIA DEATH SENTENCING PROCEDURES UNCONSTITUTIONALLY FAIL TO GUIDE JURY DISCRETION, THUS PERMITTING IMPOSITION OF DEATH SENTENCES BASED ON RACE AND OTHER IMPERMISSIBLE FACTORS.

### A. State Sentencing Procedures Must Minimize the Risk of Death Sentences being Imposed Because of Racial Stereotypes and other Constitutionally Impermissible Factors.

This Court has long recognized that racism and racial stereotypes have a pernicious influence on the administration of the criminal justice system. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Despite advancements, racial discrimination remains a pervasive influence in our society:

> "114 years after the close of the War Between the States and nearly 100 years after *Strauder* [*v. West Virginia*, 100 U.S. 303 (1880)], racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole."

*Vasquez v. Hillery*, 474 U.S. 254, 264 (1986) (quoting *Rose v. Mitchell*, 443 U.S. at 558-59).

As a result, this Court has "engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. at 309 (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). These efforts have included invalidating procedures that systematically

exclude cognizable groups from serving on grand[5] and petit juries,[6] prohibiting the use of peremptory challenges of persons from cognizable groups based on group biases,[7] forbidding the exercise of prosecutorial discretion based on racial considerations,[8] ensuring that racial prejudices of prospective jurors can be ascertained during voir dire,[9] and proscribing appeals to racism during argument to the jury.[10]

Similarly, the pervasive effects of racial prejudices have had a pivotal role in the development of this Court's capital sentencing jurisprudence. *See, e.g., Graham v. Collins*, 506 U.S. ___, 113 S. Ct. 892, 906 (1993) (Thomas, J., concurring) ("It cannot be doubted that behind the Court's condemnation of unguided discretion [in *Furman*] lay the specter of racial prejudice -- the paradigmatic capricious and irrational sentencing factor."). Vigilance is essential to minimize the detrimental effects of racism given the role that a jury has in capital sentencing schemes: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. at 35. Concerns about possible race bias resulting from the unfettered discretion then afforded capital juries echo throughout the opinions of both concurring and dissenting

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[5] *See Vasquez v. Hillery*, 474 U.S. 254 (1986).

[6] *See Whitus v. Georgia*, 385 U.S. 545 (1967); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *cf. Amadeo v. Zant*, 486 U.S. 214 (1988).

[7] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

[8] *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

[9] *Turner v. Murray*, 476 U.S. at 35.

[10] *McCleskey v. Kemp*, 481 U.S. 279, 310 n.30 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).



Justices in the landmark decision of *Furman*.[11]

To correct the constitutional deficiencies recognized in *Furman*, this Court has relied primarily on sentencing procedures that significantly narrow and guide the jury's discretion to impose death. In *Gregg v. Georgia* and the companion cases,[12] this Court concluded that to comport with the requirements of the Eighth Amendment, a sentencer's discretion to impose a death sentence must be "directed and limited" to avoid "wholly arbitrary and capricious action."[13] *Gregg*, 428 U.S. at 189 (joint opinion of Stewart, Powell, and Stevens, JJ.). To ensure nondiscriminatory application, the sentencer's discretion must be curbed and informed "'by clear and objective standards.'" *Id.* at 198 (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Coley v. State*,

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[11] *See Furman*, 408 U.S. at 255, 257 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 364-66 (Marshall, J., concurring); *cf. id.* at 389 n.12 (Burger, C.J., dissenting); *id.* at 449-50 (Powell, J., dissenting).

[12] *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

[13] This Court's jurisprudence since *Gregg* consistently has required that capital sentencing procedures protect against the risk of arbitrary and capricious imposition of death sentences. *See Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (death sentencing decisions "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible'") (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n.24 (1983)); *Lowenfeld v. Phelps*, 484 U.S. 231, 244 (1988); *California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring); *Godfrey v. Georgia*, 446 U.S. at 428; *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).[14]

Although States have wide latitude in guiding sentencers' discretion, their death sentencing procedures must do so with reference to constitutionally appropriate factors. In states, such as California, where the jury is required to "weigh" various factors in determining punishment, capital sentencing procedures "cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer v. Black*, 112 S. Ct. at 1139.

When "a person of ordinary sensibility could fairly characterize" an aggravating factor as applying to "almost every murder," or the jury's interpretation of the sentencing factor "can only be the subject of sheer speculation," that factor imposes no restraints upon the arbitrary and capricious infliction of the death sentence. *Godfrey*, 446 U.S. at 429-30; *see also Maynard*, 486 U.S. at 364 (ordinary person could honestly believe every unjustified, intentional killing came within factor). Based upon these considerations, this Court held death sentences imposed upon a finding that the offense was "outrageously or wantonly vile, horrible and inhuman," *Godfrey*, 446 U.S. at 426, or "heinous, atrocious, or cruel,"

[14] It is precisely because of these procedural safeguards that this Court could reject the challenge to capital sentencing patterns brought in *McCleskey v. Kemp*. In *McCleskey*, this Court stated that "constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.'" 481 U.S. at 313 (quoting *Singer v. United States*, 380 U.S. 24, 35 (1965). These safeguards include the requirement that the death sentence be "imposed under [state] sentencing procedures that focus discretion 'on the particularized nature of the crime'." *Id.* at 308 (quoting *Gregg*, 428 U.S. at 206). Where such safeguards exist, this Court may "lawfully presume that [the] death sentence was not 'wantonly and freakishly' imposed," *id.* (quoting *Gregg*, 428 U.S. at 207), and that there is no "constitutionally significant risk of racial bias affecting the [state] capital sentencing process," *id.* at 313.



*Shell v. Mississippi*, 498 U.S. 1, 1 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Maynard*, 486 U.S. at 363-64, violated the Eighth Amendment's proscription against unfettered jury discretion.

Moreover, a sentencing factor, no matter how clearly defined, is constitutionally invalid if it allows the sentencer to

> attach[] the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. *Herndon* v. *Lowry*, 301 U.S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. *Miller* v. *Florida*, 373 So. 2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue [is] invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

*Zant v. Stephens*, 462 U.S. 862, 885 (1983); *see also Dawson v. Delaware*, 503 U.S. ___, 112 S. Ct. 1093, 1098-99 (1992); *Baldwin v. Alabama*, 472 U.S. 372, 382 (1985).

### B. California Death Sentencing Procedures Fail to Provide Juries the Guidance Necessary to Check the Invidious Effects of Racial Biases.

California's statutory response to these constitutional requirements is an instruction to capital juries listing factors to be weighed in determining whether to sentence the defendant to death or life in prison without the possibility of parole. The first factor in this list authorizes the jury to weigh in aggravation "[t]he circumstances of the crime of

which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." Cal. Penal Code § 190.3(a) (1994). The question directly presented in this case is whether the "circumstances of the crime" aggravating factor furnishes the type of specific and detailed guidance required by the Eighth Amendment. *Amici* respectfully submit that neither the statutory language nor the state judicial interpretation of the factor performs this constitutional function.

The statutory language of California Penal Code section 190.3(a) fails to focus or narrow in any manner the jury's discretion to impose death. Section 190.3(a) instructs the jury to find and weigh the "circumstances of the crime" as aggravation *in addition to* any special circumstances found to be true. Thus, although the statute informs California juries that the "circumstances of the crime" are other than the special circumstances, they are provided no other guidance. Thus, the jury is invited to make a subjective determination as to what additional aspects of the crime constitute aggravation.

The California Supreme Court has not applied a "narrowing principle" to Penal Code section 190.3(a).[15] *Maynard*, 486 U.S. at 363. On the contrary, that court recently stated that it has not yet "explore[d] the outer reaches of the evidence admissible as a circumstance of the crime." *People v. Edwards*, 54 Cal.3d 787, 835, 819 P.2d 436, 467, 1 Cal. Rptr. 2d 696, 727 (1991). Indeed, the California Supreme Court has acknowledged that section 190.3(a) permits -- even requires -- subjective, impermissible factors to influence a California jury's decision to impose death. The state court has concluded that the "circumstances of the crime" aggravating factor does not encompass "merely the immediate temporal and spatial circumstances of the crime," *People v. Edwards*, 54 Cal.3d at 833, 1 Cal. Rptr. 2d at 725, 819 P.2d at 465, but "leave[s] the sentencer free to evaluate the evidence in accordance with his or her own subjective values," *People v. Tuilaepa*, 4 Cal.4th at 595, 15 Cal. Rptr. 2d at 398, 842 P.2d at 1158.

As written and as interpreted by the California Supreme Court, the "circumstances of the crime" aggravating factor provides no "clear and objective standards" to guide a California sentencer's discretion to impose death. *See Gregg*, 428 U.S. at 198 (joint opinion of Stewart, Powell and Stevens, JJ.). Although it is appropriate to direct the jury to find and weigh certain facets of the crime in imposing death, such an inquiry is constitutional only when it is "focus[ed] on the *particularized* circumstances of the crime and the defendant." *Id.* at 199 (joint opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added); *see also Maynard*, 486 U.S. at 363 (this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").[16]

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[15] The California Supreme Court has found no need to limit the "circumstances of the crime" factor because it has consistently held that its language is neither "'illusory' nor otherwise impermissibly 'vague.'" *People v. Tuilaepa*, 4 Cal.4th at 595, 15 Cal. Rptr. 2d at 397, 842 P.2d at 1158; *see also People v. Sims*, 5 Cal.4th 405, 466, 853 P.2d 992, 1030, 20 Cal. Rptr. 2d 537, 575 (1993); *People v. Noguera*, 4 Cal.4th 598, 648-49, 842 P.2d 1160, 15 Cal. Rptr. 2d 400, 429 (1992); *People v. Proctor*, 4 Cal.4th 499, 551, 842 P.2d 1100, 1130, 15 Cal. Rptr. 2d 340, 370 (1992).

[16] This Court in *Gregg* upheld Georgia's death sentencing scheme in part because the jury's attention was directed to "the specific circumstances of the crime." *Gregg*, 428 U.S. at 197. These specific circumstances included:

> Was it committed in the course of another capital felony?

(continued...)

In contrast to a "particularized" inquiry, the jury's interpretation of what constitutes the "circumstances of the crime" aggravating factor under Penal Code section 190.3(a) "can only be the subject of sheer speculation." *Godfrey*, 446 U.S. at 429. Moreover, section 190.3(a), by its very terms, applies to every capital offense and accordingly, "a person of ordinary sensibility could fairly characterize" it as doing so. *See Godfrey*, 446 U.S. at 428-29; *Maynard*, 486 U.S. at 363. Thus, allowing California capital jurors to weigh any and all "circumstances of the crime" they subjectively find to be aggravating without limitation or guidance results in those jurors exercising the unfettered discretion condemned in *Furman*. *See Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987) ("The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*."), *aff'd*, 486 U.S. 356 (1988).

Most important, because the aggravating circumstance is vague and imprecise, there is an unacceptable risk that impermissible considerations such as race play a role in California's capital sentencing scheme. California's vague and imprecise aggravating factor permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. 559, 562 (1953). As this Court recently recognized, "race prejudice stems from various causes and may manifest itself in different forms." *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *see Hernandez v. New York*, 500 U.S. ___, 111 S. Ct. 1859, 1872 (1991) (language differences may elicit "ridicule and scorn" as a result of racial hostility). In

[16](...continued)
Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? *Id.*



a society where race discrimination "still remain[s] a fact of life," *Hillery*, 474 U.S. at 264, jurors' sentencing decisions cannot help but be swayed by negative stereotypes about racial groups and members of racial groups. These negative racial stereotypes "produce a 'reverse halo effect': members of negatively stereotyped groups are assumed to possess negative traits, and positive information about them is devalued." King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 77 (1993).[17]

This Court has recognized that the dangers associated with negative racial stereotypes is magnified in the context of capital sentencing. A juror who believes stereotypical assumptions that members of a certain cognizable group are "violence prone or morally inferior might well be influenced by that belief" in deciding to impose the sentence of death. *Turner*, 476 U.S. at 35. In addition, such a juror may be "less favorably inclined" toward a capital defendant's mitigating evidence. *Id.* This Court also has recognized that more subtle racist attitudes such as the fear of members of a

[17] Public opinion polls confirm the widespread acknowledgement that racial discrimination persists in the criminal justice system. *See* R. Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, THE WASHINGTON POST, May 12, 1992, p. A4; *Black and White: A Newsweek Poll*, NEWSWEEK, March 7, 1988, at 23. Such discrimination has been noted in racial disparities in non-capital sentencing rates, *see Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1603 & n.35 (1988) (reviewing literature); racial disparities in the charging, sentencing and imposition of the death penalty after the *Gregg* decision, *see* U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (February 1990), reprinted in 136 Cong. Rec. S6889-90 (daily ed. May 24, 1990); and the propensity of prosecutors to exercise peremptory challenges based on group biases, *see Batson v. Kentucky*, 476 U.S. at 103-104 (Marshall, J., concurring) (reviewing data from various jurisdictions).

cognizable group "could easily be stirred up by the violent facts of [a capital crime]" and influence a juror's decision to impose death. *Id.*

As with all California capital juries, the jury that sentenced Mr. Tuilaepa to death was authorized to find and weigh on death's side of the scale the "circumstances of the crime" aggravating factor. R.T. 885. The vagueness of this factor, in combination with the distinct possibility that racial prejudice influenced the jury's decision, created an unacceptable risk that impermissible considerations infected the decision that Mr. Tuilaepa should die.

Mr. Tuilaepa is Samoan; he moved from Samoa to California with his family when he was a boy. *People v. Tuilaepa*, 4 Cal.4th at 581, 15 Cal. Rptr. 2d at 388, 842 P.2d at 1148. The offenses for which Mr. Tuilaepa was sentenced to death occurred in Long Beach, where Samoans constitute a visible, but small, minority of the population.[18]

California jurors, especially those in the area in which petitioner Tuilaepa was tried and sentenced to death, are exposed to, and may well be influenced by, a variety of negative racist stereotypes about Samoans. Mr. Tuilaepa's jurors, like the community they reflect, likely relied on generalizations about Samoans as the natural consequence of a lack of "meaningful interaction" with the Samoan community:

> [White Americans'] expectations, then, are likely to be based upon generalizations gleaned from others, the mass media, childhood impressions, and the like. . . . [White Americans] have little experience, typically, in interacting with Asian and Pacific Americans on a meaningful personal level. As a result [they] are likely to be highly influenced by . . . stereotypes.

J. Morishima, *Special Employment Issues for Asian Americans*, PUBLIC PERSONNEL MANAGEMENT JOURNAL 384, 390 (1981).[19]

The majority culture's stereotypes include generalizations that Samoans are "aggressive; easily provoked; . . . illiterate; related to one another; . . . obese; slow moving; loud." S. Sue & J.K. Morishima, *The Mental Health of Asian Americans* 117 (1982). Although the vast majority of Samoans do not engage in violent behavior, Samoans are "perceived as highly aggressive, and are known as quick-tempered brawlers." P.T. Baker, J.M. Hanna & T.S. Baker, *The Changing Samoans: Behavior and Health in Transition* 412 (1986). *Accord* A. Millican, *Samoans Proud*

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[18] Census figures from 1990 indicate that 31,917 Samoans lived in California, with 11,934 residing in Los Angeles County, 2,262 residing in Carson, 1,198 residing in Compton and 3,199 residing in Long Beach. U.S. Census Bureau, *1990 Census of Population and Housing Summary* Tape file 1A (1990).

[19] Samoans describe themselves as "one of the most ignored and misunderstood ethnic groups in Southern California, one that is hit disproportionately hard with poverty, high unemployment and school dropout rates." A. Ford, *Samoans Hoping Some Good Will Come From Woes*, LOS ANGELES TIMES, February 28, 1989, at pt. 2, p. 1, col. 6. The Samoan community's perception of their low status in society is confirmed by socio-economic indicators. Poverty is rampant in the California Samoan community. Samoans have the highest unemployment rates of all Asian and Pacific Island groups in California, with the exception of Asian Indian women. C.R. Janes, *Migration, Social Change, and Health: A Samoan Community in Urban California* 50-51 (1990). United States Census figures indicate that the median annual family income for Samoans stands at $14,242, barely two-thirds of the United States average of $19,917. P. Faletogo, *A Voice for His People; Samoan Chief Unites Island Beliefs, Mainland Reality*, LOS ANGELES TIMES, May 6, 1993, at p. J1, col.2.

*of Response to Verdict*, LOS ANGELES TIMES, May 25, 1992, at B1, col. 6 (Samoan leaders attempt to fight the "stereotype of the big, bad Samoans" and perceptions of their community as "violent and primitive."); *see also United States v. Johnson*, 956 F.2d 894, 897, 905 (9th Cir. 1991) (discussing "The Samoans," a group of large, violent men, not all of Samoan ancestry, who acted as enforcers for a drug lord).

The risk that racial prejudices played a role in Mr. Tuilaepa's death sentence cannot be discounted. Mr. Tuilaepa's crime was interracial -- he was convicted of murder for the killing of a white male -- and, as this Court has recognized, "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence." *Turner v. Murray*, 476 U.S. at 36 n.8. Because the California Supreme Court has failed to delimit "the outer reaches" of the "circumstances of the crime" that may be aggravating, the instructions did not reduce the influence of racial prejudice, and indeed, implicitly authorized predicating a death judgment on the cross-racial circumstances of the crime.

Free to roam the potentially unlimited "temporal and spatial circumstances of the crime," *People v. Edwards*, 54 Cal.3d at 833, 819 P.2d at 465, 1 Cal. Rptr. 2d at 725, jurors' racial bias, including that associated with language differences, and cultural stereotypes may well have led them to give aggravating effect to Mr. Tuilaepa's mitigating evidence. *Id.* at 35. The need for Mr. Tuilaepa's mother, who speaks only Samoan, to present her testimony through an interpreter at the sentencing phase,[20] may well have elicited "ridicule and scorn" or any number of negative images from the jurors. *See Hernandez v. New York*, 111 S. Ct. at 1872. The mitigating evidence about family tragedies endured by

[20] *People v. Tuilaepa*, 4 Cal.4th at 581, 15 Cal. Rptr. 2d at 388, 842 P.2d at 1148.



Mr. Tuilaepa -- that one brother was killed in a fight and another brother paralyzed as a result of a gunshot wound -- may well have reinforced jurors' stereotypical assumptions that Samoans are violent and inferior, and inflamed jurors' subconscious fears of violent, primitive Samoans that already were stirred up by the violent facts of the capital offense. *See Turner v. Murray*, 476 U.S. at 35.

In short, the instruction to Mr. Tuilaepa's jurors that they were to weigh the "circumstances of the crime" aggravating factor without guidance or limitation created the distinct possibility that racial prejudices, whether subtle or overt, influenced their decision to sentence Mr. Tuilaepa to death. The Georgia capital scheme denounced in *Furman* and Penal Code section 190.3(a) provide the same significant and impermissible "open invitation to discrimination." *Furman*, 408 U.S. at 365 (concurring opinion of Marshall, J.). Thus, Mr. Tuilaepa's death sentence violates the Eighth Amendment.

## CONCLUSION

*Amici* respectfully submit that the instructions provided to the jury in this case failed to provide sufficient guidance as to what factors the jury should weigh in deciding whether to impose a death sentence and permitted those critical decisions to be influenced by constitutionally impermissible factors. Accordingly, the judgment of the California Supreme Court must be reversed.

January 24, 1994

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